Lee Wah Bank Ltd v Chee Kong Electrical Engineering Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-822 OF 1992
ABDUL AZIZ J
21 MAY 1999

Civil Procedure *— Summary judgment — Delay in application for summary judgment — Application made after filing of defence — No triable issues raised — Whether summary judgment should be denied*

This is an appeal by the plaintiffs after the senior assistant registrar dismissed their application for summary judgment against the second and third defendants. The application for summary judgment was only filed by the plaintiffs nine months after the defence was filed. No explanation for the delay was given.

Held, allowing the appeal:

The unexplained delay in this case is no bar to summary judgment. Delay is no answer to an application for summary judgment where there are no bona fide triable issues. This is so even if the application is made after a defence has been filed (see p 159F–G); *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818 followed; *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134 distinguished.

[Bahasa Malaysia summary

Ini adalah rayuan oleh plaintif-plaintif selepas penolong kanan pendaftar menolak permohonan untuk penghakiman terus terhadap defendan kedua dan ketiga. Permohonan untuk penghakiman terus hanya difailkan oleh plaintif sembilan bulan selepas pembelaan difailkan. Tiada penjelasan diberikan untuk kelengahan tersebut.

Diputuskan, membenarkan rayuan tersebut:

Kelengahan yang tidak dijelaskan bukanlah halangan kepada penghakiman terus. Kelengahan bukanlah jawapan kepada suatu permohonan penghakiman terus di mana tidak terdapat isu yang boleh dibicarakan secara bona fide. Ini adalah juga keadaannya jika permohonan dibuat selepas pembelaan difailkan (lihat ms 159F–G); *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818 diikut; *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134 dibeza.]

Notes

For cases on application for summary judgment made after filing of defence, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4510–4513.

Cases referred to

Brinks Ltd v Abu-Saleh & Ors (No 1) [1995] 4 All ER 65 (refd)
Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd [1969] 2 MLJ 98 (refd)
Krishnamurthy & Anor v Malayan Finance Corp Bhd [1986] 2 MLJ 134 (distd)
McLardy v Slateum (1890) 24 QBD 504 (refd)
Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York [1997] 3 MLJ 818 (folld)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)

Legislation referred to

Limitation Act 1953 s 6(3)

Ajit Kumar Hastir (*Chooi & Co*) for the plaintiffs.
Saran Singh (*Saran Singh & Co*) for the second and third defendants.

Cur Adv Vult

Abdul Aziz J: This is the plaintiff's appeal against the dismissal by the learned senior assistant registrar of their application for summary judgment against the second and third defendants ('the defendants').

The defendants have raised in this appeal several issues through the written submission of their solicitors.

Rate of interest

The plaintiffs' letter of offer specified, in respect of the trust receipt facility, a rate of interest of $2^1/_2\%$ over their base lending rate of 10.75%. In para 4 of the letter of offer, however, the plaintiffs reserved the right to vary the rate of interest. The plaintiffs seek final judgment in the sum of RM98,164.50 in respect of the trust receipt facility, with further interest at 3% above the base lending rate from 1 July 1991 until full settlement.

The defendants complain that interest claimed is excessive and ambiguous and that the exact amount of it cannot be quantified.

I do not see that the interest is excessive.

For saying that the interest rate is ambiguous and that the amount of interest cannot be quantified, the defendants rely on *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30. That was a case where the Federal Court held that the judgment was riddled with uncertainties serious enough to render it an irregular judgment. Here, however, there are no such uncertainties in the judgment sought in respect of the trust receipt facility. Moreover, the interest rate is not ambiguous and the interest can be quantified.

Limitation

The defendants raise s 6(3) of the Limitation Act 1953 against the interest claimed by the plaintiffs, complaining that the plaintiffs have not stated 'the period from which the rate of interest begins'.

Section 6(3) does not apply in this case. It is about recovery of arrears of interest in respect of a judgment debt. The present case is not a case of recovery of interest in respect of a judgment debt. There is yet no judgment debt in respect of which one can think of recovering interest. The question under s 6(3) will only arise in this case if, after obtaining judgment against the defendants, the plaintiffs should delay for the prescribed limitation period in taking action to recover the judgment sum and the interest on it.

Performance bond

Part of the plaintiffs' claim against the defendants is a sum paid by plaintiffs on a performance bond, which was one of the facilities provided by the plaintiffs to the first defendant, who were the nominated subcontractor for a certain project. By cl (1) of the performance bond, the plaintiffs guaranteed to the main contractor the due performance by the first defendants of the subcontract, and by cl (2) the plaintiffs agreed that upon default by the first defendants on the subcontract they would forthwith, on demand in writing, pay the main contractor the guaranteed sum

The defendants contend that the plaintiffs should not have paid the guaranteed sum because there was no default on the part of the first defendants.

I agree with learned counsel for the plaintiffs that as the plaintiffs' obligation was to pay the main contractor on the performance bond on demand; the plaintiffs were not obliged to have the default established before their obligation to pay the main contractor could arise. It was sufficient that they be told by the main contractor when making the demand that the first defendants had defaulted. If, by the plaintiffs' paying under the performance guarantee, the first defendants became indebted to the plaintiffs when in fact they had not defaulted they could have recourse to the main contractor.

In para 6 of their affidavit dated 27 August 1993, the defendants, as if to justify the contention they would be making, and have now made, that there had been no default on the part of the first defendants, pointed out that the main contractor themselves had admitted that the termination of the contract was wrong . That contention, in the context of para 6, is apt to create the impression that the main contractor had terminated the subcontract by reason of default on the part of the first defendants but subsequently admitted that they had wrongfully terminated the subcontract because the first defendants had not been in default. The basis of that assertion, however, was a letter from the main contractor to the first defendants dated 18 June 1990 informing the first defendants that the employer had terminated the employment of the main contractor. What the

main contractor said in that letter was wrongful was the termination of their own employment by the employer and was not anything to do between the main contractor and the first defendants.

Delay

There has been no explanation for the delay of nine months from the time defence was filed until the time the summary-judgment application was filed.

The Court of Appeal has ruled in *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818 that delay is no answer to an application for summary judgment where there are no bona fide triable issues. Referring to a proposition that a summons for summary judgment may be defeated solely upon the ground of delay in making the application, Gopal Sri Ram JCA said at p 821D–E:

> Such a proposition runs counter to the interests of justice. For delay can surely provide no answer to an application made under O 14 where there are no bona fide triable issues. We therefore take this opportunity to declare the absence of the proposition contended for by counsel.

I found that most gratifying because I myself have been baffled as to the existence of a good reason for such a proposition. The statement is like a breath of fresh air.

The statement has further an implication. Taken literally, its corollary is that if there are bona fide triable issues, delay can provide an answer to an application for summary judgment. Since, however, the existence of a triable issue is the true answer to such an application, if a triable issue can be shown to exist, the application simply cannot succeed, and delay need not come into the balance at all. So what the statement amounts to is that delay is not relevant in an application for summary judgment. Irrespective of delay, if there is no triable issue or no reason otherwise for going to trial, the application must succeed, but if there is a triable issue, the application must fail.

I am, however, faced with a difficulty in the matter of stare decisis. As if to reinforce their opinion, the Court of Appeal cited *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98, which applied a passage in *McLardy v Slateum* (1890) 24 QBD 504 on the intention of the English O 14 r 1, from which I quote the following portion (at pp 506–507):

> Although the primary intention of the rule may be that an application should be made before defence has been delivered in the ordinary course, yet we think that it is not in all cases compulsory. Therefore our judgment upon this point of law and practice is that a plaintiff is not necessarily too late in making his application under O 14 r 1 because a defence has been delivered. ...
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> If a plaintiff makes his application after the ordinary time, the onus is on him to shew that the delay is justifiable under the special circumstances of the case.

That appears to be , as far as reported decisions go, the source authority on the question of delay in applications for summary judgment, and the Court

of Appeal viewed it with favour as supporting their judgment. But the last sentence of the passage would appear to require delay to be justified if one is to be qualified to obtain summary judgment, so that if there has been delay, and the delay cannot be justified, the plaintiff is not qualified to obtain summary judgment.

That is what the Supreme Court said in *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134. They adopted what they considered to be the ratio decidendi in *McLardy v Slateum*. This is what they said (at p 135I–B):

> In the second place the law as to the time when an application for an O 14 judgment could be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court no O 14 judgment could be signed.

The Supreme Court there clearly expressed what could only be implied from *McLardy*, that is to say, that if there has been delay, the plaintiff must explain it, and if the explanation is not accepted by the court, no summary judgment can be granted. It follows that if there is no explanation at all, no summary judgment can be granted.

There is manifested a conflict of opinion between the Supreme Court in *Krishnamurthy* and the Court of Appeal in *Perkapalan Shamelin Jaya*, which does not indicate that *Krishnamurthy* was considered. Which authority should I follow?

There is to be considered the question of the acceptability of the consequence of what *Krishnamurthy* laid down. It is that a case wherein it is shown that there are no triable issues and which, therefore, if tried will come to nothing for the defendant, has, nevertheless, got to go for trial simply because the plaintiff has delayed, until after the defence has been filed, in applying for summary judgment and has not offered an explanation, or a satisfactory explanation, for the delay. To the Court of Appeal such a consequence was not acceptable. It ran counter to the interests of justice. Obviously it does. It would be like the court telling the defendant this: 'I see that you have no case and I know that if the case goes to trial you will lose. But because the plaintiff has delayed in applying for summary judgment and has failed to explain the delay, I will penalize him, and the way I am going to do it is to postpone the evil day for you — which will surely come unless you sooner settle with him — and to withhold his due from him until that day.' It will be like penalizing the plaintiff just for the sake of penalizing him. But surely, in matters of procedure, a party should be penalized only where his default or omission has prejudiced the other party or if by not penalizing him the other party will suffer some undue prejudice or harm, and the penalty must be such as will compensate him for the prejudice caused or will save him from the prejudice or harm. In the case of a delayed application for summary judgment, I am unable to see in what way the defendant will be prejudiced by the delay, and if at all there is prejudice, the most that the plaintiff ought to suffer is something of a compensatory nature but not the outright deprivation of his right to summary judgment where no triable issue can be shown to exist.

From *Krishnamurthy* and from *McLardy* it is clear that there is no time limit within which an application for summary judgment may be made. It may be made even after a defence has been filed and how long a delay after that is permissible is not stated, but if there is delay there must be an acceptable justification of the delay. The fact that that is the only requirement on a tardy plaintiff shows that it could not have been recognized that delay would cause any prejudice to the defendant. To pass the hurdle, a plaintiff need only explain the delay satisfactorily. The explanation can only involve the affairs and circumstances of the plaintiff. Consideration of prejudice or otherwise to the defendant cannot form part of the explanation for the delay. In terms of maintaining a balance of fairness between the plaintiff and the defendant, the requirement of an acceptable explanation for delay is, therefore, gratuitous.

That delay is not a relevant matter in an application for summary judgment was decided by Jacob J in *Brinks Ltd v Abu-Saleh & Ors (No 1)* [1995] 4 All ER 65 at pp 68f–69c. I quote:

> What then is the rule as regards delay and O 14? It is said that the plaintiffs have delayed so much, and the case is so close to trial, that I should regard the application as an abuse of process. Now it is true that normally plaintiffs used O 14 shortly after they commence proceedings, normally, but not always, before a defence is filed. But there is nothing in the rules precluding an application at a later stage in the proceedings. I do not see why delay, of itself, should be a relevant matter. If there is 'no defence to the claim' or the defendant cannot show that there is an 'issue or question in dispute which ought to be tried or that there ought for some other reason to be a trail of that claim' then delay can make no difference. Of course in some circumstances delay in proceeding summarily, coupled with an adoption of the procedures for full trial, may well suggest a weakness in the plaintiff's case or may even sometimes suggest some other reason for trial. But it would be that weakness or reason, not the delay itself, which led to refusal of the application. Moreover the plaintiff may well, having indicated an intention to go to full trial and then having incurred his own costs and caused the defendant to incur his in going down that route, have to suffer a penalty in costs if he brings his O 14 application late. But otherwise I can see no objection to a late application for judgment under O 14. Indeed, in some cases, and I think this is one, its use may be commendable as saving both the extra costs and time involved in a full trial. If these defendants truly have no defence it is worse and pointless for them to be present at the trial, which will be complex enough without them. The plaintiffs are right to clear the decks as far as possible before trial.
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> The only case which counsel could find on delay in instituting O 14 proceedings was from 1890. It was *McLardy v Slateum* (1890) 24 QBD 504, where the issue was whether or not an application for O 14 relief could be made after a defence had been served. It was held that it could, but Pollock B added, obiter (at pp 506–507):
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> > 'If a plaintiff makes his application after the ordinary time, the onus is on him to shew that the delay is justifiable under the special circumstances of the case.'
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> He gave no reason for so saying. Whilst that may well have been apposite in the 1890s, when trials were quicker and cheaper and I suspect O 14 was more restricted in its use, I do not think it appropriate today.

A It is to be noted that to Jacob J the ratio decidendi of *McLardy* was only that an application for summary judgment could be made after a defence had been served. Unlike the Supreme Court in *Krishnamurthy*, Jacob J regarded Pollock B's addition of the need to justify the delay as merely obiter.

In urging me not to regard the aforementioned statement of the B Supreme Court as having a binding effect on me, learned counsel for the plaintiffs submitted that the statement was merely a dictum and did not constitute the ratio decidendi of the case. In that case the plaintiffs applied for summary judgment almost two months after the defendants entered their appearances. No defence had been filed. It was submitted that because of the delay the plaintiffs were not entitled to summary judgment. The C report does not state on what basis or authority it was so submitted. The Supreme Court simply decided that they did not think the delay in that case was such as to inhibit the granting of summary judgment. The Supreme Court did not, in deciding on the objection, have to consider the question of granting summary judgment on an application made after the defence has been filed. I therefore agree that the statement of the Supreme Court about D the necessity for an explanation where the application for summary judgment is made after the delivery of defence is not the ratio decidemdi of the case but was merely a dictum following *McLardy*. On the other hand, the Court of Appeal in *Perkapalan Shamelin Jaya*, in ruling that delay cannot defeat an application for summary judgment where there are no trial issues, E did so in a case where a defence had been filed about five months before the application for summary judgment and turned to *McLardy* in support of their ruling. Although it was not stated in the judgment of the Court of Appeal that the question of delay that was considered was delay in the sense that the application for summary judgment was made after the defence had been filed, the fact that such was the case and that the Court of Appeal F considered *McLardy* leads me to conclude that the Court of Appeal, in making the ruling, was answering a question which encompassed the question, the facts for which were present in that case, whether summary judgment could be granted where the application for it is made after the defence has been filed. I would therefore regard that the ruling of the Court of Appeal that delay is no answer to an application for summary judgment G where there are no bona fide triable issues as including a ruling that that is so even if the application is made after a defence has been filed. The ruling constitutes a ratio decidendi and is binding on me. I therefore hold that the unexplained delay in this case is no bar to summary judgment.

As the defendants have failed to raise any triable issue, I allow the H appeal and make orders in terms of prayers (a) and (b) in the plaintiffs' application for summary judgment (encl 21). I order costs for the plaintiffs here and before the senior assistant registrar.

Appeal allowed.

I Reported by Joel Ng